



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.E014 OF 2020

**RANDOLPH M. TINDIKA T/A TINDIKA & COMPANY ADVOCATES.....APPELLANT**

**-VERSUS-**

**1. MANTEL LIMITED**

**2. MISA M. AUCTIONEERS.....RESPONDENTS**

**RULING**

1. The Appellant/Applicant filed a **Notice of Motion** application dated **29<sup>th</sup> October, 2020** on even date which he amended on **7<sup>th</sup> November, 2020**, seeking several orders.

2. The application is supported by a **Supporting** and **Further Affidavit** together with an affidavit in reply to Respondents' **Replying Affidavit**.

3. The Respondent on the other hand, opposed the application by a **Preliminary Objection** and **Replying Affidavit** on **16<sup>th</sup> November, 2020**, in which the issue of jurisdiction was raised.

4. On **23<sup>rd</sup> November, 2020** this court directed that the Appellant's **Notice of Motion** application dated **29<sup>th</sup> October, 2020** which was subsequently amended on **7<sup>th</sup> November, 2020** to be heard contemporaneously with a **Notice of Preliminary Objection** dated **16<sup>th</sup> November, 2020** filed by the Respondent. The **Notice of Motion** application dated **29<sup>th</sup> October, 2020** and the **Preliminary Objection** dated **16<sup>th</sup> November, 2020** form the subject of this **Ruling**.

5. The Notice of motion application has been brought under **Section 1A, 1B, 3A** of the **Civil Procedure Act, Order 42 Rule 6(1) & (6)** and **Order 51 Rule 1** all of the **Civil Procedure Rules** and other enabling provisions of law. It seeks for the following orders;

**a. Spent;**

**b. Spent;**

**c. That this court be pleased to issue an order of temporary injunction restraining the Respondents, by themselves, their agents, assigns and/or employees or anyone claiming in or through them or otherwise howsoever from entering and/or getting into the premises herein, removing, taking away, distraining or distressing for rent, taking possession of the Appellant/Applicant's moveable properties in the demised premises or in any other way whatsoever interfering with the Appellant/Applicant's possession, occupation, utilization and/or quiet enjoyment of the premises standing of the title number: Mombasa/Block XXVI/144, pending the hearing and determination of Appeal herein.**

**d. That this Honourable Court be pleased to make an Order of stay of all manner of proceedings in CMCC No. 2012 of 2019, Mombasa, pending the inter-parte hearing of this application and further pending the hearing and determination of the appeal herein.**

**e. That the costs of this Application be borne by the Respondents.**

6. The application is premised on among other grounds that the Appellant/Applicant had filed a **Notice of Motion** application dated **15<sup>th</sup> November, 2019** against the Respondent in the trial court challenging the unlawful distress for rent which the Applicant believed was a premeditated effort to obtain vacant possession. The Applicant avers that the trial court failed to consider the grounds he advanced in the

application and eventually dismissed the application.

7. According to the Applicant, the central dispute culminating to the application before the trial court was purported distress for rent over a premise wherein the Appellant/Applicant carries out his legal practice and out of caution, he deposited the disputed rent arrears amounting to **Kshs.1,779,400.00**. As it stands, the Applicant avers that the Respondent will not be prejudiced if the orders sought are granted. The Applicant further avers that if the orders sought are not granted he will suffer irreparable loss and the substratum of the instant Appeal as well as the suit before lower court.

8. Further, it is the Appellant/Applicant's case that although the 1<sup>st</sup> Defendant participated in the application dated **15<sup>th</sup> November, 2019**, it later filed a **Notice of Preliminary Objection** purporting that the trial court lacked jurisdiction, which, according to the Applicant is only geared to undermine the dignity of this court. The Appellant/Applicant also feels that there might be collusion between the trial court and 1<sup>st</sup> Defendant and it will be reasonable for this court to order stay of all proceedings before the trial court.

9. These grounds are further explained in the **affidavit** in support of the application sworn on **9<sup>th</sup> November, 2020** by **Randolph M. Tindika**, the Applicant herein. There is also a **Supplementary Affidavit** filed on **18<sup>th</sup> January, 2021** which was sworn by the Applicant in response to allegations made by the 1<sup>st</sup> Respondent in its **Replying Affidavit**.

10. The application is opposed by the 1<sup>st</sup> Respondent and in doing so, it filed a **Notice of Preliminary Objection** dated **16<sup>th</sup> November, 2020** and a **Replying Affidavit** sworn by **Shahid Lalji** sworn on the **9<sup>th</sup> December, 2020**. The **Preliminary Objection** raises only two grounds namely;

**a. That this Honourable Court lacks jurisdiction to hear and or determine this Appeal which is filed in the wrong court contrary to Article 162(2)(b) of the Constitution and Section 13(2)(a) of the Environment and Land Court Act. The Appeal and the application herein arise from a Landlord/Tenant relationship which is a claim to use and occupy land wherein the Appellant's application for injunction is against distress for rent arrears by the Respondents (Landlord and Auctioneer, respectively) was dismissed by the lower court.**

**b. The Appeal and the application herein are bad in law and amount to an abuse of the process of this Honourable Court and the same should be struck out with costs.**

11. The application together with the *Preliminary Objection* were canvassed by way of written submission. The 1<sup>st</sup> Respondent filed its submissions in respect of the **Preliminary Objection** on **23<sup>rd</sup> November, 2020**. It is submitted therein that the relationship between the Applicant and the 1<sup>st</sup> Respondent is that of advocate and tenant relationship and the dispute relates to use and occupation of the 1<sup>st</sup> Respondent's property. Such disputes, according to the 1<sup>st</sup> Respondent, ought to be tabled before the Environment and Land Court by dint of **Article 162 (2)** of the **Constitution** as well as **Section 13** of the **Environment and Land Court Act**. The 1<sup>st</sup> Respondent therefore sought this court to find that the appeal was wrongly filed before this court and should proceed to declare that it lacks the requisite jurisdiction and down its tools. The court is also referred to consider the case of **Owners of Motor Vessels "S" –vs- Caltex Oil (K) Ltd (1989) KLR 1**, in reaching its decision.

12. The Applicant on the other hand, filed separate submissions in relation to the application and the Preliminary Objections. The submissions as regards the Preliminary Objection were filed on **18<sup>th</sup> January, 2021** and the main argument canvassed by the Appellant/Applicant is that the Environment and Land Court is the one clothed with limited jurisdiction to determine on matters relating to environment and land use and cannot extend to handling contractual matters which include landlord and tenant disputes as the dispute herein. He reiterated that the basis for the instant appeal was distress for rent for the sum of **Kshs.1,779,400/=** and this court is the right court to determine the appeal. The Counsel cited a myriad of cases in support of his arguments including the case of **Dhirajlal J. Shah & another ..Vs.. Vijay Amrital Shethia[2018] eKLR**, which I have also considered.

13. With respect to the **Notice of Motion** application dated **7<sup>th</sup> November, 2020** the Applicant filed submission dated **15<sup>th</sup> January, 2021** on the **18<sup>th</sup> January, 2021**. They largely reflect on the grounds on face of the application and I have read through the entire document. I have also considered the authorities cited therein.

### **Analysis and Determination**

14. I have carefully considered the Applicants' application, the affidavits sworn in support and rebuttal thereof, the notice of Preliminary Objection filed by the Respondent and the parties' respective submissions. The proper practice is for the Court to **determine the Preliminary Objections first** before dealing with the merits of the application, if necessary.

### **The Preliminary Objection**

15. The law is clear that a **Preliminary Objection** relates purely to matters of law. In the celebrated decision of **Mukisa Biscuits Manufacturing Co. Ltd ..Vs.. West End Distributors Ltd [1969]EA 696**, Law J.A stated that a **Preliminary Objection** to be thus:-

**“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

16. Sir, Charles Newbold, President stated in the same Judgment as follows:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

17. The Respondent in this case submitted that the relationship between the parties herein is that of a landlord/tenant, which has been conceded to by the Applicant and the dispute involves the right of to use and occupy the premises, thus the Appeal ought to have been filed before the Environment and Land Court. The Appellant/Applicant on the other hand, submitted that the dispute revolves on a contractual agreement between a landlord and tenant and the court has the requisite jurisdiction to determine contractual matters.

18. The limitation of this court’s vast powers as conferred under **Article 165** is to be found in **Sub-Article (5)** which states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:-

**a. Reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or**

**b. Falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).**

19. Clearly, this court has no jurisdiction to determine matters falling under **Article 162 (2) (a) & (b)**. But what are these matters? The answer to this question is found in the provisions of **Section 13** of the **Environment and Land Court Act**, an Act of Parliament enacted to give effect to **Article 162(2)(b)** of the **Constitution**; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

20. **Section 13** of the **Environment and Land Court Act** provides that:

**a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**b. Relating to compulsory acquisition of land;**

**c. Relating to land administration and management;**

**d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**e. any other dispute relating to environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

21. It is therefore right to articulate that the jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its **use, possession, control, title, compulsory acquisition or any other dispute touching on land**, then this Court has no jurisdiction.

22. The prayers sought in this application as well as the intendment I deduce from the memorandum of appeal reveal that the Appellant/Applicant seeks an injunction to restrain the 1<sup>st</sup> Respondent from interfering with the Applicant’s occupation and utilization of the rental premises wherein his offices are situated. Therefore, it would not be an obstinate view for this court to state that occupation and continued utilization of rented premises falls within the category of “use of land”. Accordingly, this court finds that the germane of the application is actually a land issue falling squarely in the forbidden sphere of the Environment and Land Court.

23. The upshot is that this court finds merit in the **Preliminary Objection** dated **16<sup>th</sup> November, 2020** and upholds the same to the extent that this Appeal ought to have been filed before the **Environment and Land Court**. However, I direct the file to be mentioned before the Environment and Land Court on a date to be fixed at the registry. The *status quo* in the matter shall be maintained until otherwise directed by the **Environment and Land Court**. Costs shall follow the cause of the Appeal.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 11<sup>TH</sup> DAY OF MARCH, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

